FOR ARGUMENT

No. 78-1870

In the Supreme Court of the United States

OCTOBER TERM, 1979

WHIRLPOOL CORPORATION, PETITIONER

v.

RAY MARSHALL, SECRETARY OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A39) is reported at 593 F.2d 715. The opinion of the district court is reported at 416 F. Supp. 30 (Pet. App. A43-A49).

JURISDICTION

The judgment of the court of appeals was entered on February 22, 1979, and a petition for rehearing was denied on April 4, 1979 (Pet. App. A40-A42). The petition for a writ of certiorari was filed on June 18, 1979, and was granted on October 1, 1979 (A. 12). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 11(c)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 660(c)(1), as interpreted by the Secretary of Labor in 29 C.F.R. 1977.12(b)(2), prohibits an employer from retaliating against an employee who refuses to perform particular assigned tasks that the employee reasonably believes present an immediate danger of death or serious bodily injury under circumstances that do not provide sufficient time to resort to the regular enforcement procedures under the Act.

STATUTE AND REGULATION INVOLVED

1. Section 11(c)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 660(c)(1), provides:

> No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act.

2. 29 C.F.R. 1977.12, 38 Fed. Reg. 2681, 2683, as corrected 38 Fed. Reg. 4577 (1973), provides:

> *Exercise of any right afforded by the Act.*
>
> (a) In addition to protecting employees who file complaints, institute proceedings, or testify in proceedings under or related to the Act, section 11(c) also protects employees from discrimination occurring because of the exercise "of any

right afforded by this Act." Certain rights are explicitly provided in the Act; for example, there is a right to participate as a party in enforcement proceedings (sec. 10). Certain other rights exist by necessary implication. For example, employees may request information from the Occupational Safety and Health Administration; such requests would constitute the exercise of a right afforded by the Act. Likewise, employees interviewed by agents of the Secretary in the course of inspections or investigations could not subsequently be discriminated against because of their cooperation.

(b)(1) On the other hand, review of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace. Hazardous conditions which may be violative of the Act will ordinarily be corrected by the employer, once brought to his attention. If corrections are not accomplished, or if there is dispute about the existence of a hazard, the employee will normally have opportunity to request inspection of the workplace pursuant to section 8(f) of the Act, or to seek the assistance of other public agencies which have responsibility in the field of safety and health. Under such circumstances, therefore, an employer would not ordinarily be in violation of section 11(c) by taking action to discipline an employee for refusing to perform normal job activities because of alleged safety or health hazards.

(2) However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

STATEMENT

1. Petitioner Whirlpool Corporation maintains a manufacturing plant in Marion, Ohio, for the production of household appliances (Pet. App. A5). Overhead conveyors transport appliance components throughout the plant. To protect employees from parts that occasionally fall from the conveyors, petitioner has installed a wire mesh "floor" approximately 20 feet above the plant floor (Pet. App. A5;

Jt. Ex. 485, 496; Tr. 9).[1] The wire mesh is welded to angle iron frames, which are supported by angle iron hangers suspended from the building's structural steel skeleton (Jt. Ex. 488-494).

Maintenance employees in the plant spend an average of 15-30 hours weekly per employee removing fallen parts from the screen, replacing paper spread on the screen to catch grease drippings from the parts on the conveyor, and performing occasional maintenance on the conveyors themselves (Pet. App. A5; Jt. Ex. 135, 156, 176-177, 458; Tr. 10). To do so, employees customarily walked on the guard screen "floor" (Pet. App. A5; Jt. Ex. 156; Tr. 10). Prior to the time of the events in this case, the company's safety instructions admonished workers to step carefully and only on the angle iron frames (Jt. Ex. 250-251, 281; Tr. 10). Although employees usually were able to perform their tasks while standing on the frames, they had to step onto the wire mesh itself from time to time. In addition, workers sometimes inadvertently fell onto the screen panels (Jt. Ex. 176-177, 231).

In 1973 the company began to install heavier wire mesh in the screens because the safety of the original panels was "questionable" (Pet. App. A5-A6; Jt. Ex. 54, 459, 500-501, 513). Several maintenance men

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[1] "Jt. Ex." refers to the transcript of a hearing before an Administrative Law Judge of the Occupational Safety and Health Review Commission (see note 3, *infra*), which was admitted into evidence at trial. "Tr." refers to the trial transcript.

had fallen partly through the lighter mesh and one had fallen to the floor below (Pet. App. A6; Jt. Ex. 162-164, 175, 176, 230-232; Tr. 11).

Petitioner received a number of complaints about the unsafe nature of the older screens from two maintenance employees, Virgil Deemer and Thomas Cornwell.[2] In mid-June 1974, the company safety director dismissed one such complaint with the comment that "the guard screen was not made to walk on" (Tr. 12). A few weeks later, on June 28, 1974, a maintenance employee fell to his death through the guard screen in an area where the newer, stronger mesh had not yet been installed (Pet. App. A6; Jt. Ex. 135, 223, 448; Tr. 12).[3]

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[2] In fact, less than one year before the events at issue in this case, Cornwell slipped from the angle iron and broke a bone in his wrist trying to stop his fall when his foot plunged through the screen (Jt. Ex. 231-232; Tr. 43-44).

[3] As a result of this fatality, the Secretary conducted an investigation that resulted in the issuance of a citation charging the company with maintaining an unsafe walking and working surface, in violation of the Act's general duty clause, 29 U.S.C. 654(a)(1). The general duty clause provides that each employer "shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." After extensive administrative proceedings, the Occupational Safety and Health Review Commission affirmed the citation, finding that petitioner's recognition of the hazard was demonstrated by its instructions to employees to walk on the angle irons, not the screens, and by the series of accidents on the screens. *Whirlpool Corp.*, 3 Empl. Safety & Health Guide (ESHG) (CCH) ¶ 23,552 (May 11, 1979). The company has petitioned for review of that decision in the United States Court of

After the fatal accident, petitioner issued a general order strictly forbidding maintenance employees from stepping on the screens or the supporting structure (Pet. App. A6; Tr. 13, 45, 97). An alternative method of cleaning the screens was developed, whereby employees stood on power-raised mobile platforms (Verta-Lifts) and used hooks to recover fallen parts (Pet. App. A45; Tr. 13). Although maintenance employees could complete most of their duties in this fashion, the Verta-Lift procedure took longer, and there was some question whether the lifts could be raised sufficiently high to permit maintenance of all the screens (Pet. App. A6; Tr. 13-15, 88). Deemer and Cornwell therefore believed that they might have to resume walking on the guard screens, and, as a result, they continued to be concerned about the safety of the screens (Pet. App. A6; Tr. 13-15).

Deemer and Cornwell met with the company's maintenance supervisor on July 7, 1974, to discuss their concern. The maintenance supervisor disagreed with their view that the screens were unsafe, but he agreed that the two men could inspect the screens with their foreman on their next shift and point out dangerous areas needing repair (Pet. App. A6; Tr. 14-15, 81-82). The inspection took place that night, and Deemer and Cornwell identified places in the guard screens that "were in bad need of repair" (Tr. 34) because of holes in the screens or loose or missing

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frame bolts (Tr. 15-16, 33-34, 59-60, 83).[4] Some repairs were made, but these efforts were terminated before all the areas identified as hazardous were repaired (Pet. App. A6; Tr. 16, 34-35). Beyond these visible defects, there was evidence that the old style mesh was generally unsafe because it would not adequately support the weight of a person standing on it (Pet. App. A5-A6; Tr. 21, 34, 46, 49; see also *Whirlpool Corp.*, 3 Empl. Safety & Health Guide (ESHG) (CCH) ¶ 23,552, at 28,534 n.6) (OSHRC May 11, 1979).

Concerned that petitioner did not take their fears about the screens seriously, Deemer and Cornwell had a meeting on July 9 with the plant safety director, at which they requested the name, telephone number, and address of a representative of the local office of the Occupational Safety and Health Administration (Pet. App. A6; Tr. 16-17). The safety director appeared reluctant to furnish the information and told the men that they "had better stop and think about what [they] were doing" (Pet. A6; Tr. 17). These actions, characterized by the court of appeals as "veiled threats" (Pet. App. A6), led Deemer to believe that the safety director was attempting to discourage them from using the safety procedures of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.* (Tr. 37). After furnishing the information about OSHA, the safety director also asked

[4] The fatal accident on June 28, 1974, apparently was the result of unfastened or missing bolts in a screen frame (Jt. Ex. 75, 212). See also *Whirlpool Corp., supra,* 3 ESHG (CCH) ¶ 23,552, at 28,532.

Deemer and Cornwell to write down their names, clock numbers, and department number (Pet. App. A6; Tr. 17). Later the same day, Deemer contacted an official of the regional OSHA office and discussed the guard screens (Tr. 17-18).

On the following day, July 10, 1974, Deemer and Cornwell reported for the night shift at 10:45 p.m. and awaited assignment (Pet. App. A6; Tr. 19, 48). In a departure from his normal practice, the foreman first assigned tasks to all of the other maintenance employees. He then directed Deemer and Cornwell to meet him with the Verta-Lift at the bulkhead service line. The guard screen in this area was one on which the old mesh had not been replaced or fully repaired, despite the fact that the two men had identified specific instances of hazardous disrepair during their inspection tour with the foreman three days earlier (Tr. 19-20, 33-35, 47-48, 82-83).

All three men ascended to the screen, but Deemer and Cornwell remained on the Verta-Lift while the foreman walked along the angle iron frame supporting the screen (Tr. 20-21, 89).[5] The foreman returned to the Verta-Lift and told the two men that he believed the screen was safe so long as they used "extreme caution" (Tr. 21-22, 48, 102). Then, in violation of the outstanding company directive that

[5] The foreman's tour of the guard screens did not expose him to the hazards facing workers who must police the screens. It is comparatively easy to step only on the angle iron frames and use handholds if an individual's hands are empty and there is no need to reach components resting on the wire mesh (Jt. Ex. 176-177, 231; Tr. 89).

maintenance work should be accomplished without stepping on the screen apparatus, the foreman ordered Deemer and Cornwell onto the apparatus to clean the screen. The foreman, however, pointed out several areas that he did not want the men to walk on because he did not believe the areas were adequately supported (Pet. App. A6, A44-A45; Tr. 21-22, 48, 89, 102). When Deemer and Cornwell refused to carry out the order, claiming that the screens were unsafe, the foreman immediately sent them to the personnel office. The men were ordered to punch out without working the remaining six hours' shift time, and they subsequently suffered a loss in pay and received written reprimands (Pet. App. A6; Tr. 21-23, 31, 36, 49, 78-79).

2. On August 24, 1974, the Secretary of Labor filed suit in the United States District Court for the Northern District of Ohio, alleging that petitioner's disciplinary action constituted unlawful retaliation against Deemer and Cornwell in violation of Section 11(c)(1) of the Act, 29 U.S.C. 660(c)(1). After a bench trial, the district court agreed that petitioner had violated 29 C.F.R. 1977.12(b)(2), the regulation interpreting Section 11(c)(1), which provides that an employer may not retaliate or discriminate against an employee who refuses to perform a task that he reasonably believes presents a real danger of death or serious injury, under circumstances allowing insufficient time to resort to the regular statutory enforcement channels to eliminate the danger.

The district court found that Deemer and Cornwell "refused to perform the cleaning operation because of a genuine fear of death or serious bodily harm" (Pet. App. A45). The court observed that the two men were denied the opportunity to use the Verta-Lifts, the alternative procedure the company had developed for cleaning the screens after the fatal accident. Moreover, in the court's view (*ibid.*), "the fact that a man had fallen through the screen and been killed is the strongest possible evidence that it was unsafe and dangerous." Thus, the court concluded that the danger presented was "real and not something which existed only in the minds of the employees" and that the employees acted in good faith and had no reasonable alternative to refusing to work (*id.* at A45-A46).

The district court nevertheless denied relief, because it concluded that the regulation exceeded the Secretary's authority under the Act (Pet. App. A47-A49). The court did not hold that the regulation conflicts with any provision of the Act or with the underlying statutory purpose to prevent occupational injuries. Rather, the court relied solely on two aspects of the legislative history of the Act that it believed were indicative of a congressional intent inconsistent with the terms of the regulation. Specifically, the court found it significant that Congress had rejected a provision that would have allowed employees to absent themselves from work in certain situations without loss of pay and had refused to adopt another provision that would have permitted a Department

of Labor inspector, without resort to judicial process, to close down a workplace presenting an imminent danger to the health or safety of employees. Hence, according to the district court, "Congress squarely faced the issue as to whether or not employees should be permitted to leave the job when faced with a dangerous situation and decided that they should not" (Pet. App. A47).

3. The court of appeals reversed. The court agreed with the district court's factual determination that petitioner had violated the Act (as interpreted by the regulation) finding in the record "ample support for [the] conclusion that the employees declined to do their work because they reasonably feared for their lives" (Pet. App. A5 n.5). But the court of appeals disagreed with the district court's holding that the regulation is invalid.

The court of appeals pointed to the liberal construction given antidiscrimination provisions in other remedial statutes, notably the National Labor Relations Act (see *NLRB* v. *Scrivener*, 405 U.S. 117 (1972)), and suggested that it would have found the complainants in this case protected against management retaliation for their refusal to mount the guard screens even in the absence of the Secretary's regulation affording that protection (Pet. App. A15-A18). In any event, the court of appeals concluded that the regulation, to which it owed the "traditional deference" paid to an administrative interpretation of an Act of Congress, is consistent with the Act's remedial purpose to reduce danger in the workplace and with

Congress' conclusion that employee participation is crucial to effective enforcement of the Act (*id.* at A10-A12). Finding the "right to a hazard-free work place * * * implicit throughout the Act" and "specifically contained in the Act's statement of purpose" (*id* at A17), the court reasoned that Section 11(c)(1) must protect the correlative right to refuse work "in the face of deadly peril" and (*id.* at A12) that the section should be so interpreted to avoid having the statutory protections "gutted by employer intimidation."

The court of appeals then rejected the argument, on which the district court had placed its exclusive reliance, that the legislative history revealed an intent to deny employees the protection afforded by the regulation (Pet. App. A20-A36). The court observed that the provision permitting employees to receive pay when they refused to work in certain situations was quite different from the regulation at issue in this case because it did not deal with threats of imminent death or serious injury (*id.* at A27). Moreover, the court found that, particularly because the rejected provision was repeatedly branded as a right to "strike with pay" (*id.* at A27-A28 & n.35), congressional resistance stemmed solely from "the added incentive" afforded to employees who would receive their regular compensation when they did not perform work (*id.* at A29-A30). This piece of legislative history therefore did not, in the court's view, undercut the validity of 29 C.F.R. 1977.12(b)(2), which confers no right to receive pay for services not performed.

The court of appeals was also not persuaded that Congress' refusal to grant the Secretary of Labor administrative authority to halt operations presenting imminent dangers without seeking a prior judicial order had any bearing on the validity of the regulation, which merely protects individual employees from employer retaliation in certain narrowly defined circumstances. In the court's view, the provision for administrative closings was rejected by Congress because of fears of its potential for misuse, perhaps as an aid to striking workers, and because of doubts about its fairness or constitutionality (Pet. App. A34-A35 & nn.46-47).

SUMMARY OF ARGUMENT

Section 11(c)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 660(c)(1), provides that an employer may not discharge or otherwise discriminate against an employee for exercising "any right afforded by this Act." Soon after the Act was passed, the Secretary of Labor promulgated a regulation interpreting the Act to afford an employee a right, under narrowly limited circumstances, to refuse to perform a task that the employee reasonably and in good faith believes would expose him to a "real danger of death or serious injury." 29 C.F.R. 1977.12(b)(2). The regulation further provides that the employer is prohibited by Section 11(c)(1) of the Act from discriminating or retaliating against the employee for his exercise of this limited right to refuse imminently hazardous work.

Petitioner challenges the interpretation of the Act contained in the regulation, arguing that the Act provides no protection from employer retaliation no matter how grave and immediate the danger confronting the employee when he refused to work. We submit that the regulation correctly construes the Act, because Congress could not have expected an employee to remain at his post under perilous circumstances on pain of being disciplined or fired by his employer. An examination of the structure and purposes of the Act confirms this conclusion.

I

The regulation, promulgated pursuant to the Secretary's "broad authority" under 29 U.S.C. 657(g)(2) (see *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 317 n.12 (1978)) to issue rules and regulations to carry out his responsibilities, reflects a reasonable and contemporaneous interpretation of the Act.

A. The purposes of the Occupational Safety and Health Act are to assure "so far as possible" that every working man and woman will have "safe and healthful working conditions" and "to preserve our human resources." 29 U.S.C. 651. These purposes are implemented through specific health and safety standards promulgated by the Secretary and by a general statutory requirement that an employer furnish his employees with a workplace that is "free from recognized hazards that are causing or are likely to cause death or serious physical harm." 29 U.S.C. 654.

The Act also provides a procedure to counteract imminent dangers of death or serious injury. An employee may request an inspection of the workplace, which is to be conducted with dispatch. 29 U.S.C. 657(f)(1). The Secretary is then authorized to seek injunctive relief if the inspection confirms the existence of an imminently dangerous condition of employment. 29 U.S.C. 662. An employee may properly be expected to follow these statutory procedures to eliminate the danger, rather than merely refusing to work, when he has a reasonable opportunity to do so. For this reason, the Secretary has not interpreted Section 11(c)(1) of the Act to protect an employee from employer retaliation if he simply refuses to perform dangerous work indefinitely or in lieu of contacting an OSHA representative. See 29 C.F.R. 1977.12(b)(1).

The Act does not expressly provide, however, what an employee should be expected to do when he is ordered to perform a dangerous task at a time when he does not have a reasonable opportunity to contact an OSHA representative or, after he contacts the representative, while waiting for the statutory imminent danger procedures to run their course. The limited right to refuse work recognized in 29 C.F.R. 1977.12(b)(2) applies only in these narrow circumstances, when the statutory procedures are unavailable. To insist that the employee must continue to work in the face of imminent danger would be to create the unwarranted risk of death or serious injury that Congress specifically sought to avoid. 29 U.S.C. 654(a)(1). Such a construction would be

wholly inconsistent with the clear design of the Act to prevent the first accident and to involve employees at all phases of its implementation, including in imminent danger situations.

Finally, if an employee has a good faith and reasonable fear of death or serious injury, it would be manifestly unfair to insist that he nevertheless continue to work on pain of employer sanctions. An employee's refusal to work under such circumstances is "unquestionably activit[y] to correct conditions which modern labor-management legislation treats as too bad to have to be tolerated in a humane and civilized society like ours." *NLRB* v. *Washington Aluminum Co.*, 370 U.S. 9, 17 (1962).

B. In addition to recognizing a personal right under the Act to refuse to work, the regulation is also an appropriate measure in aid of the Secretary's investigative and enforcement responsibilities and in implementation of the antidiscrimination prohibition in Section 11(c)(1) of the Act. Because of the shortage of investigators and the unpredictability of the occurrence of imminent dangers, the Secretary must rely on information provided by employees. A refusal to work in the face of an imminent danger will generally be intimately bound up with the process of contacting the Secretary for assistance. Hence, the antidiscrimination provision in Section 11(c)(1) must be given a liberal construction protecting this refusal to work in order to further that section's purpose of preventing these channels of communication from being closed through employer in-

timidation. *NLRB* v. *Scrivener*, 405 U.S. 117, 122 (1972). Similarly, recognition of a right to refuse to work when the employee is unable to initiate contact with an OSHA representative preserves the status quo in the manner least likely to result in a serious accident, thereby enabling the Secretary to perform his statutory duties under the imminent danger provisions in a meaningful manner.

C. The Act's recognition of a limited right to avoid hazardous work is consistent with the pattern of existing labor legislation. Indeed, it is narrower in important respects than rights long protected under Section 7 of the National Labor Relations Act, 29 U.S.C. 157, which protects concerted activity pertaining to safety matters irrespective of any objective assessment of the seriousness of the hazard or the absence of any attempt by the employees to have the condition corrected by other means. Moreover, Section 502 of the Labor-Management Relations Act, 29 U.S.C. 143, creates an exception to an express or implied no-strike obligation in a collective bargaining agreement for a refusal to work under "abnormally dangerous" circumstances. *Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368, 385-387 (1974). Finally, the comparable antidiscrimination clause of the Federal Coal Mine Health and Safety Act, 30 U.S.C. (Supp. I) 815(c)(1), has been interpreted by the courts and Congress to embody a right to refuse to work in dangerous situations.

II

In attacking the validity of 29 C.F.R. 1977.12 (b)(2), petitioner places principal reliance on two portions of the legislative history of the Act. Neither supports petitioner's position.

A. During the legislative debates prior to the passage of the Act, Congress failed to adopt a provision that would have required employees to be paid their regular wages if they absented themselves from work to avoid exposure to certain toxic or harmful substances. However, this right would not have arisen until 60 days after the government had determined that the substance was harmful or toxic. Given this 60-day waiting period, the rejected provision did not address the *imminent* dangers covered by the regulation. In addition, opposition to this provision, which was repeatedly referred to as a right to "strike with pay," was premised solely on the fact that employees would be paid while not working—a novel proposition in federal labor legislation. The regulation involved here does not require an employer to pay an employee who does not work.

B. Congress also failed to adopt a provision giving an OSHA inspector the authority, without resort to the judicial process, to close down an operation or plant in the face of an imminent danger to employee health or safety. Petitioner infers that this demonstrates the congressional intent that a cessation of employer operations should never occur unless the Secretary first obtains a court order and that an employee is therefore not protected by the Act if, on

his own initiative, he refuses to work rather than risk life or limb.

However, opposition to the administrative shutdown provision stemmed from a fear of arbitrary action *by the government*, acting through a single inspector who might be inexperienced or susceptible to pressure from labor or management in the midst of a labor dispute. Opponents of the provision also questioned its fairness and constitutionality, arguing that the drastic consequence of a government-ordered plant closing should not occur without the procedural protections offered by judicial proceedings.

The Secretary's regulation, in contrast, does not authorize the government to shut down a plant without a court order. Rather than intruding the government into labor disputes, it merely protects an individual employee's personal decision to refuse work rather than risk death or serious injury. Moreover, the employee who refuses work in reliance on the regulation runs the risk that the Secretary or the courts will subsequently find that his refusal to work was unreasonable under the circumstances. This furnishes a significant check on the exercise of the self-help right.

ARGUMENT

I

THE REGULATION PROHIBITING EMPLOYER RETALIATION AGAINST EMPLOYEES WHO REFUSE TO WORK UNDER HAZARDOUS CONDITIONS IS CONSISTENT WITH THE OCCUPATIONAL SAFETY AND HEALTH ACT

Petitioner argues that the Secretary of Labor has no authority under the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*, an Act of Congress whose overriding purpose is to prevent occupational illness or injury, to ensure that an employer does not take retaliatory action against an employee who refuses in good faith to perform a specific assigned task that the employee reasonably believes would expose him to a real danger of death or serious bodily injury. Petitioner contends that the Secretary lacks this authority even where the employee first sought to have his employer correct the dangerous condition and where the employee had insufficient time, due to the urgency of the situation, to eliminate the danger by resorting to the statutory enforcement procedures otherwise provided in the Act.

Like the court of appeals (Pet. App. A39), however, we submit that "the same Congress which wanted employees to work in safe and healthful surroundings could not have meant for them to die at their posts." The regulation petitioner attacks, 29 C.F.R. 1977.12(b)(2), is consistent with this inescapable conclusion. Indeed, as one commentator

has observed, "the credibility of the entire Act would be questionable if workers could be forced to risk death or serious physical harm to prevent being permanently discharged." M. Rothstein, *Occupational Safety and Health Laws* § 186, at 199 (1978).[6]

A. The Regulation Represents a Reasonable and Contemporaneous Construction of the Act as Embodying a Right of Employees to Refuse to Work Under Conditions That Create a Reasonable Fear of Death or Serious Injury When There is no Alternative Available

The regulation at issue in this case, 29 C.F.R. 1977.12(b)(2), provides that an employee may not be subjected to employer discrimination or retaliation for refusing to work under certain limited circumstances. The employee must be confronted with a situation in which "a reasonable person * * * would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels." The regulation further provides that, where possible, the employee "must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition."[7] What is more,

[6] The complainants in the present case were disciplined, not discharged. Nonetheless, petitioner's argument would extend as well to situations in which an employer fired an employee for refusing to work under hazardous conditions.

[7] In addition to arguing that the regulation is invalid, petitioner contends (Pet. Br. 36-45) that the regulation was not violated in this case. However, the sole question presented

the Secretary has taken the position in enforcing the regulation that the employee is not entitled under the regulation to refuse an alternative assignment to a

in the petition for a writ of certiorari (Pet. 2) is whether the Secretary exceeded his authority in promulgating the regulation, and it was that question alone on which the Secretary acquiesced in review and that the Court agreed to decide. The question whether the regulation was violated in the particular circumstances of this case is therefore not before the Court. Sup. Ct. R. 23(c); *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 177-178 (1938).

In any event, as the court of appeals observed, there is in the record "ample support for [the district court's] conclusion that the employees declined to do their work because they reasonably feared for their lives" (Pet. App. A5 n.5). A maintenance employee fell through a guard screen to his death, and, in response, petitioner instituted a policy forbidding employees to walk on the guard screen apparatus. Complainants were justified in viewing the company's policy as a confirmation that the screens were, in fact, unsafe.

Moreover, there was substantial evidence that the complainants acted in good faith. Deemer testified, for example, that when he was taken by his foreman to the personnel office following his refusal to walk on the screens, he acknowledged that cleaning the screens was part of his duties but stated that "since a man was killed there should be some changes made" (Tr. 23; see also Tr. 31). Cornwell, who had previously cracked a bone in his wrist in an accident on the old-type screen (Tr. 43-44), testified that "it personally puts a scare in an individual when he has been in an area when somebody does lose their life. I know it scared me" (Tr. 45).

Petitioner suggests (Pet. Br. 38) that the complainants were not entitled to the protection afforded by the regulation because they "had notice" some three days before the work refusal that they would have to return to the guard screens and therefore should have resorted to other measures to eliminate the danger rather than refusing to work. However, the "notice" to which petitioner refers was nothing more than Deemer's own prediction that "sooner or later" the main-

safe task or reassignment to the same task if the hazard abates, if the employer corrects it, or if a safe method of performing it is proffered. Finally, the

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tenance personnel would have to go back on the screens because some of the work could not be done from the Verta-Lifts (Pet. Br. 38 n.22; see Tr. 14-22). This prediction on the employee's part is a far cry from being confronted with a specific order by his employer to perform a dangerous task. But it was because of this prediction that Deemer and Cornwell approached the plant safety director three days before they refused to go onto the screens. Thus, both when they approached the safety director and on the night of July 10, the complainants satisfied the requirement of the regulation that they seek to have the employer correct the situation before refusing work.

Petitioner also argues (Pet. Br. 38) that the protection of the regulation was unavailable because complainants had contacted an OSHA representative "one full day" prior to the work refusal and because an OSHA inspector had already made visits to the plant on July 1 and 5 in response to the fatal accident. This was therefore not a case, petitioner argues, "where the urgency of the situation precluded resort to normal administrative remedies." Petitioner overlooks the fact that at the time the screens were inspected and Deemer contacted the OSHA representative, maintenance personnel had not been ordered to return to the screens; indeed, there was an outstanding company policy forbidding them from doing so. In an abundance of caution, Deemer contacted the OSHA representative because he feared that this policy would change and that he would be confronted with the urgency of a specific order to go on the screens. When Deemer and Cornwell were specifically ordered onto the screens at 11 o'clock in the evening, they could reasonably conclude that there was no reasonable opportunity for the Secretary to intercede.

Petitioner also mentions the fact that other employees cleaned the screens after the complainants declined to do so (Pet. Br. 37; see Tr. 80). But contrary to petitioner's apparent assertion, this does not necessarily imply that those

Secretary has not interpreted the regulation to require payment of the employee for any period when no work is performed.[8]

Petitioner does not, and could not, argue that this carefully circumscribed regulation is barred by any specific provision of the Act or that it is inconsistent with the Act's fundamental purpose to prevent occupational injuries. Nor does petitioner suggest what other action an employee may fairly and reasonably be expected to take, instead of refusing to work, when he is confronted with a genuine and immediate threat of death or serious injury.

It should be emphasized, moreover, that this is hardly a question solely of academic interest. The

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employees believed that the screens were safe. Given the fact that Deemer and Cornwell were sent home for refusing to work on the screens, other employees could reasonably conclude that they would meet the same fate, or worse, if they too refused. It was precisely this type of coercion that the regulation was designed to prevent.

In sum, both lower courts correctly determined that petitioner's disciplinary actions against Deemer and Cornwell violated the regulation. Even assuming that this factual question is properly presented, it does not warrant further review. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635-636 (1967).

[8] Where there has been discrimination, the regulation does, of course, provide a right to be made whole. The Secretary has sought recovery in this action of approximately $50 wages lost by the employees because petitioner placed them on disciplinary suspension, rather than assigning them alternative tasks that it has not disputed were available. In general, the Secretary's regulation requires an employee who invokes it to perform safe, alternative tasks if they are available, and to forgo pay if they are not. Under the regulation, an employer will never have to pay wages without receiving (or forgoing the opportunity to receive) work.

reported decisions graphically illustrate the dilemma often faced by workers confronted with a specific and unanticipated order to perform a hazardous task. In *Marshall* v. *Daniel Construction Co.*, 563 F.2d 707 (5th Cir. 1977), cert. denied, 439 U.S. 880 (1978), for example, an employee was ordered by his foreman to mount a 150-foot-high steel skeleton on a windy day. And in *Marshall* v. *Seaward Constr. Co.*, 3 Empl. Safety & Health Guide (ESHG) (CCH) ¶ 23,433 (D.N.H. March 28, 1979), the employees were ordered to burn off rivets at the edge of a bridge under "extremely windy" conditions that the project engineer agreed presented a significant danger. The employees in both cases refused to perform the work because of genuine concerns for their safety, and they paid for their refusals with their jobs. As we demonstrate below, the Secretary's regulation affords employees such as these a realistic way to cope with their dilemma and thereby embodies a reasonable interpretation of the Act.

The Secretary of Labor is empowered by Section 8(g)(2) of the Act, 29 U.S.C. 657(g)(2), to "prescribe such rules and regulations as he may deem necessary to carry out [his] responsibilities under the Act." The Court has described this section as a grant of "broad authority" to the Secretary. *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 317 n.12 (1978). This authority unquestionably includes the power to "adopt regulations to carry into effect the will of Congress as expressed by the statute." *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 213-214 (1976),

quoting *Dixon* v. *United States*, 381 U.S. 68, 74 (1965), and *Manhattan General Equipment Co.* v. *Commissioner*, 297 U.S. 129, 134 (1936). See also *United States* v. *Larionoff*, 431 U.S. 864, 873 (1977).

A regulation promulgated pursuant to such authority "will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'" *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973), quoting *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268, 280-281 (1969). See also *American Trucking Assns.* v. *United States*, 344 U.S. 298 (1953). Moreover, particular deference is due regulations that are based on a consistent and contemporaneous administrative interpretation of the statute concerned. In such circumstances, "[a] reviewing court is * * * to be guided by the 'venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong. * * *'" *E. I. duPont deNemours & Co.* v. *Collins*, 432 U.S. 46, 54-55 (1977), quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969). See also *United States* v. *Rutherford*, No. 78-605 (June 18, 1979), slip op. 8-9. Here, the regulation at issue was promulgated by the Secretary soon after passage of the Act (see 38 Fed. Reg. 2681 (Jan. 29, 1973), as corrected, 38 Fed. Reg. 4577 (Feb. 16, 1973)), clearly "carr[ies] into effect the will of Congress," and is reasonably related to the purposes of the statute.

The Act was passed in order to remedy the " 'drastic' national problem" of occupational death and injury. *Atlas Roofing Co.* v. *Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 444 (1977). The Act's stated purpose is

> to assure *so far as possible* every working man and woman in the Nation safe and healthful working conditions and *to preserve our human resources* * * *.

29 U.S.C. 651(b) (emphasis added). Remedial legislation such as this is to be liberally construed to effectuate the congressional goal. *United States* v. *An Article of Drug* * * * *Bacto-Unidisk*, 394 U.S. 784, 798 (1969); *Lilly* v. *Grand Trunk R.R.*, 317 U.S. 481, 486 (1943).

This general purpose was to be implemented in large part by authorizing the Secretary of Labor to promulgate safety and health standards, 29 U.S.C. 655, and by requiring that employers and employees abide by those standards, 29 U.S.C. 654(a)(2) and (b). But even in the absence of a specific safety standard governing a particular hazard, the employer has an overriding obligation under the Act's general duty clause to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. 654(a)(1).[9] Thus, the

[9] This provision has been construed to require an employer to take every available feasible measure to discover and exclude from his workplace all conditions recognized as hazardous by the employer or by the industry of which it is a part. See, *e.g.*, *General Dynamics Corp.* v. *OSHRC*, 599 F.2d 453, 464 (1st Cir. 1979); *Titanium Metals Corp. of America* v. *Usery*, 579 F.2d 536, 543-544 (9th Cir. 1978); *Empire-Detroit Steel Div.* v. *OSHRC*, 579 F.2d 378, 384 (6th Cir. 1978); *National Realty and Constr. Co.* v. *OSHRC*, 489 F.2d 1257, 1265-1267 & nn. 35, 36, 37 (D.C. Cir. 1973).

Act on its face provides employees with a right to be free of hazards that are causing or are likely to cause death or serious bodily injury. The regulation at issue in this case is addressed to hazards of the same magnitude—ones that would subject an employee to a "real danger of death or serious injury." 29 C.F.R. 1977.12(b)(2).

Because the regulation is therefore based on a right that is expressed in the Act itself, the remaining question is whether the Act may reasonably be interpreted to recognize a companion right of an employee to refuse to work under hazardous conditions if they present an *imminent* danger of life and limb and if he has no reasonable opportunity to resort to the

The Occupational Safety and Health Review Commission found with respect to the guard screens involved in this case that petitioner had violated its obligation under 29 U.S.C. 654(a)(1) to furnish employment free of recognized hazards causing or likely to cause death or serious physical harm to its employees. The Commission concluded that petitioner's own recognition of the hazard was confirmed by its general instructions to employees to walk on the supporting angle irons, not the screens themselves, and by the series of accidents on the screens. *Whirlpool Corp.*, *supra*, 3 ESHG (CCH) ¶ 23,552, at 28,534 n.6. See note 3, *supra*. Of course, after the fatal accident, and before the complainants' refusal to work in this case, petitioner instructed its maintenance employees to stay off the screen structure altogether and to clean the screens from the Verta-Lifts. See pages 7, *supra*.

specific enforcement procedures set forth in the statute. If so, the employee must be free of employer retaliation when he does so, because Section 11(c)(1) prohibits retaliation in response to the exercise of "any right afforded by this Act." Again, guidance may be drawn from the very terms of the Act.

The Act makes clear that employees are to be integrally involved in its enforcement. Section 2 of the Act, 29 U.S.C. 651, provides that the purposes of the Act—to ensure "safe and healthful working conditions" and to "preserve our human resources"—are to be accomplished, *inter alia*, by encouraging both "employers and employees * * * to reduce * * * occupational safety and health hazards" at the workplace and stimulating them to institute and improve programs toward this end; by providing that employers and employees "have separate but dependent responsibilities and rights" with respect to the achievement of safe and healthful working conditions; by "building upon advances already made through employer and employee initiative"; and by "encouraging joint labor-management efforts" to reduce job related injury and disease. 29 U.S.C. 651(b)(1), (2), (4) and (13).[10]

[10] The Act reaches nearly five million workplaces, where more than 64 million individuals are employed. See *The President's Report [To Congress] On Occupational Safety And Health For 1973* 57-60 (G.P.O. 1975). Congress recognized that federal and state safety inspectors would be in short supply and that employee assistance in enforcing the Act would be critical to its effectiveness. See, *e.g.*, S. Rep. No. 91-1282, 91st Cong., 2d Sess. 11-12, 21-22 (1970) (Leg. Hist. 151-152, 161-162); H.R. Rep. No. 91-1291, 91st Cong., 2d Sess. 22, 31 (1970) (Leg. Hist. 852, 861). See also Pet. App. A12; Cohen, *The Occupational Safety and Health Act: A Labor Lawyer's Overview*, 33 Ohio St. L.J. 788, 799-802 (1972).

The bills, committee reports, and floor debates comprising the legislative history of the Act are collected in a Committee Print prepared by the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare entitled *Legislative History of the Occupational Safety and Health Act of 1970*, 92d Cong., 1st Sess. (1971). References to this document will be cited to "Leg. Hist." See *Atlas Roofing Co.* v. *Occupational Safety & Health Review Comm'n, supra*, 430 U.S. at 445 n.1.

As petitioner concedes (Pet. Br. 17-18), a number of specific statutory provisions further this intent to involve employees in enforcement of the Act. Employees are entitled, for example, to challenge the validity of safety standards issued by the Secretary, to receive notice of and participate in proceedings regarding applications for variances from such standards, and to be advised of and participate in proceedings regarding citations for alleged violations of the Act. 29 U.S.C. 655, 658 and 659. Employees are also entitled to request inspections of the workplace, to talk privately with inspectors, and to accompany an inspector on his tour of the workplace. 29 U.S.C. 657.

In addition to these provisions of general applicability, the Act also provides for employee participation in stituations giving rise to imminent danger. Again, the Act authorizes the employee to request an inspection when he believes an imminent danger exists. 29 U.S.C. 657(f)(1). If, following the in-

spection, the inspector agrees that such a danger exists—*i.e.*, that there are "conditions or practices" in the workplace that "could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided" in the Act (see 29 U.S.C. 662(a))[11]—he must inform the affected employees and the employer of the danger and notify them that he is recommending that the Secretary seek injunctive relief. 29 U.S.C. 662(c). The Secretary may then bring an action to restrain the conditions or practices giving rise to the imminent danger. The court may order the employer to avoid, correct, or remove the danger or prohibit the employment of individuals in the area. 29 U.S.C. 662(a). If the Secretary arbitrarily or capriciously fails to seek injunctive relief, an employee or employee representative may bring a mandamus action to compel the Secretary to do so. 29 U.S.C. 662(d).

Given the availability of these detailed statutory procedures, the Secretary's regulations explicitly acknowledge that, "as a general matter, there is no

[11] The normal method of enforcement is for the Secretary to issue a citation of an alleged violation and to fix a reasonable time for abatement of the violation. 29 U.S.C. 658(a). However, if the employer contests the citation, the effective date of the abatement order is postponed until after the completion of all administrative proceedings, including a hearing before an administrative law judge and review by the Commission. 29 U.S.C. 659(b) and (c). As the present case reflects, this process may be protracted. See note 3, *supra*.

right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions." 29 C.F.R. 1977.12(b)(1). The regulation continues:

> Hazardous conditions which may be violative of the Act will ordinarily be corrected by the employer, once brought to his attention. If corrections are not accomplished, or if there is dispute about the existence of a hazard, the employee will normally have opportunity to request inspection of the workplace pursuant to section 8(f) of the Act, or to seek the assistance of other public agencies which have responsibility in the field of safety and health. Under such circumstances, therefore, an employer would not ordinarily be in violation of section 11(c) by taking action to discipline an employee for refusing to perform normal job activities because of alleged safety or health hazards.

The Act does not expressly explain, however, what an employee is expected to do when, as in the present case, he has sought unsuccessfully to have his employer abate the dangerous condition and there is insufficient time, due to the urgency of the situation, to eliminate the danger by requesting an inspection by the Secretary with a view toward injunctive relief. Petitioner argues that the silence of the Act on this point is dispositive and that Congress must have intended that the employee abide by his employer's directions until the Secretary obtains a court order under 29 U.S.C. 662(a). Under petitioner's analysis,

the employer would be free to discipline an employee who refused to work while waiting for the inspector to arrive. Indeed, the employer could presumably even discipline an employee who refused to work *after* the inspector had assessed the situation, agreed that there was an imminent danger, and notified the employee and employer of the danger and of his intention to recommend that the Secretary seek injunctive relief (see 29 U.S.C. 662(c)). This would be so, according to petitioner, because the judicial process expressly provided for in the Act (which petitioner argues was intended to be the exclusive remedy) would still not have been successfully invoked.

But the silence of the Act on the question of employee self-help under these narrow but critical circumstances is hardly a justifiable basis for fashioning a rule, such as the one petitioner proposes, that would be wholly at odds with the Act's express and overriding purpose to prevent death or serious physical harm as a result of employment. See 29 U.S.C. 651(b), 654(a)(1). The Act is prophylactic, not compensatory in nature. *Atlas Roofing Co.* v. *Occupational Safety & Health Review Comm'n*, *supra*, 430 U.S. at 444-445.[12] It was intended to "prevent the first accident."

[12] See also *United Parcel Service of Ohio* v. *OSHRC*, 570 F.2d 806, 812 (8th Cir. 1978); *Allis-Chalmers Corp.* v. *OSHRC*, 542 F.2d 27, 31 (7th Cir. 1976); *Brennan* v. *OSHRC*, 513 F.2d 1032, 1039 (2d Cir. 1975); *Lee Way Motor Freight, Inc.* v. *Secretary of Labor*, 511 F.2d 864, 870 (10th Cir. 1975); *Ryder Truck Lines, Inc.* v. *Brennan*, 497 F.2d 230, 233 (5th Cir. 1974).

The legislative history is replete with strong references to the Act's preventive purpose and the tragedy of each individual death or accident. See, *e.g.*, S. Rep. No. 91-1282, *supra*, at 2 (Leg. Hist. 142); 116 Cong. Rec. 37628 (1970) (Leg. Hist. 516) (Sen. Nelson); 116 Cong. Rec. 37628 (1970) (Leg. Hist. 518) (Sen. Cranston); 116 Cong. Rec. 37630 (1970) (Leg. Hist. 522) (Sen. Randolph); H.R. Rep. No. 91-1291, *supra*, at 23 (Leg. Hist. 853); 116 Cong. Rec. 38367 (1970) (Leg. Hist. 981) (Rep. Anderson); 116 Cong. Rec. 38386 (1970) (Leg. Hist. 1031) (Rep. Dent). The statement of Senator Yarborough, a sponsor of the Senate bill, is especially compelling:

> We are talking about people's lives, not the indifference of some cost accountants. We are talking about assuring the men and women who work in our plants and factories that they will go home after a day's work with their bodies intact.

116 Cong. Rec. 37625 (1970) (Leg. Hist. 510).

Lee Way Motor Freight, Inc. v. *Secretary of Labor*, 511 F.2d 864, 870 (10th Cir. 1975). Accord: *United Parcel Service of Ohio* v. *OSHRC*, 570 F.2d 806, 812 (8th Cir. 1978); *Allis-Chalmers Corp.* v. *OSHRC*, 542 F.2d 27, 31 (7th Cir. 1976). It would be of little solace to an employee who was injured while waiting for the OSHA inspector to arrive or for injunctive relief to be granted that the inspector or the court might subsequently agree that the employee was indeed confronted with immediate peril, that the immediate peril should be corrected in the future, or that the employee should receive workmen's compensation or other relief for the injuries sustained when he followed his employer's instructions.

Nor does the Act furnish any basis for petitioner's underlying premise that employees confronted with what to them appears to be a situation of imminent danger should trust the determination of their employer that no such danger exists or that they should

continue to work in the face of the danger. Congress fully appreciated that employees would often be in the best position to identify hazardous conditions at the workplace (see, *e.g.*, S. Rep. No. 91-1282, *supra*, at 11 (Leg. Hist. 151); 116 Cong. Rec. 37340 (1970) (Leg. Hist. 430) (remarks of Sen. Williams)) and, accordingly, the Act reflects an unmistakable purpose and design to involve employers *and* employees in its implementation and enforcement. See pages 30-32, *supra*. Moreover, the employee runs a grave risk—and the very one OSHA was intended to prevent—if he works under circumstances covered by the regulation; the employer, on the other hand, may lose little or nothing by acquiescing in the employee's temporary refusal.[13] In the present case, for example, petitioner, at little or no inconvenience, could have allowed Deemer and Cornwell to clean the guard screens from the Verta-Lift pursuant to the established company policy or could have assigned them to do other work that they routinely performed. Nothing in the Act or its legislative history suggests that the employee's judgment and concern for safety must always give way to what might be the employer's quite different judgment and concerns in a situation of immediate peril in which, by the terms of the regulation, the neutral offices of the Secretary

[13] An OSHA inspector is ordinarily expected to inspect a jobsite allegedly containing a condition of imminent danger within 24 hours of notification. OSHA *Field Operations Manual*, ch. IX, 1 ESHG (CCH) § 4370.3 (Jan. 1979) Any loss to the employer is therefore likely to be very brief, minimal and of short duration.

and the courts are temporarily unavailable to resolve the disagreement.

What is more, even if a company has a general policy that would not require employees to submit to hazardous working conditions, the regulation nevertheless furnishes needed protection where a lower level supervisor—perhaps because of pressure to produce or personal animus toward an employee—countermands the company's policy and orders the employee to work despite the imminent danger. This case offers a good illustration: although petitioner attempts to demonstrate its corporate good faith with respect to the guard screens (Pet. Br. 36-45), it does not explain what practical value this laudable corporate policy was to Deemer and Cornwell when the foreman disregarded the policy and directed them to work on the screen frames.

It is also important not to lose sight of the dilemma in which an employee covered by 29 C.F.R. 1977.12 (b) (2) finds himself. Assuming, as the regulation requires, that the employee has a good faith and reasonable fear of death or serious injury, it would be contrary to all principles of fairness, not to mention human nature, to demand that the individual submit to the danger. This Court has acknowledged that the refusal by employees to work under adverse conditions far less threatening to life and limb than those to which the regulation is addressed is a "perfectly natural and reasonable thing to do." *NLRB* v. *Washington Aluminum Co.*, 370 U.S. 9, 16 (1962). Surely, then, a refusal to work under the far more aggra-

vated circumstances contemplated by the regulation is "unquestionably activit[y] to correct conditions which modern labor-management legislation treats as too bad to have to be tolerated in a humane and civilized society like ours." *Id.* at 17.

The Court's decision in *NLRB* v. *Washington Aluminum Co.*, *supra*, and the Secretary's recognition in this case of an employee's right to be free of employer sanctions when he responds in the only way a humane society can expect—by refusing to submit to the danger—are consistent with principles of necessity in our jurisprudence generally. A defense of duress or necessity has long been recognized in the criminal law where a person has been compelled by external forces, natural or human, to engage in prohibited conduct. Although the conduct remains criminal, it is excused because it is better for the individual to choose the lesser evil of violating the law in order to avoid the greater evil with which he is threatened. W. LaFave & A. Scott, *Handbook on Criminal Law* § 49, at 374 (1972). "[I]t is highly just and equitable that a man should be excused for those acts which are done through unavoidable force and compulsion." 4 W. Blackstone, *Commentaries on the Laws of England* 27 (1897). So too here, enactment of OSHA must be taken as a legislative judgment that death or serious injury is a greater evil that is legitimately avoided by resort to the lesser evil of temporarily violating an employer's instructions to work. To this extent, and where no alternatives are available, the employee must be excused from liability for disobeying the employer's directive.

Indeed, the limitations in 29 C.F.R. 1977.12(b)(2) closely parallel the judicially fashioned restrictions on the availability of the duress defense under the criminal law. First, as under the duress defense, the circumstances prompting the refusal to work must induce a *reasonable* fear of death or serious bodily harm,[14] and the threat must be *immediate*. See 1 W. Burdick, *Law of Crime* § 199, at 262-263 (1946); W. LaFave & A. Scott, *supra*, § 49, at 377-378. Second, the person must have no reasonable opportunity to avoid the threatened harm by resort to lawful means—under the regulation, by seeking to have the condition corrected by the employer or by resort to statutory procedures. Compare W. LaFave & A. Scott, *supra*, § 49, at 377. The duress defense under the criminal law also requires that the threat last for the duration of the conduct sought to be excused. See, *e.g.*, *Respublica* v. *McCarty*, 2 U.S. (2 Dall.) 86 (Pa. Sup. Ct. 1781). Similarly, under 29 C.F.R. 1977.12(b)(2), the employee would not have a protected right to continue to resort to self-help measures after he had a reasonable opportunity to invoke statutory enforcement procedures or after those procedures have run their course without affording relief.

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[14] Thus, petitioner is simply wrong in suggesting (Pet. 2) that the regulation affords protection from retaliation on the basis of the employee's subjective fear of danger. See note 18, *infra*.

B. The Regulation Is a Reasonable Measure for Implementing the Antidiscrimination Prohibition in Section 11(c)(1) and for Carrying Out the Secretary's Responsibilities Under the Act

In addition to recognizing a personal right implicit in the Act for an employee to absent himself from what he reasonably believes to be perilous conditions, the regulation is also an appropriate measure in aid of the Secretary's investigative and enforcement responsibilities and in aid of the policies of the antidiscrimination prohibition in Section 11(c)(1) of the Act, 29 U.S.C. 660(c)(1).

As noted above (see page 26, *supra*), the Secretary is empowered to "prescribe such rules and regulations as he may deem necessary to carry out [his] responsibilities under the Act." 29 U.S.C. 657(g)(2). Among the Secretary's responsibilities, and central to this case, is his duty to conduct investigations of alleged imminent dangers and to seek injunctive relief if the employer does not abate the condition voluntarily. 29 U.S.C. 657(f)(1) and 662(a). Because of the shortage of investigators (see note 10, *supra*) and the remoteness of the possibility that an investigator would be at a workplace at the moment an imminent danger is perceived, it is evident that the Secretary must depend on employees to notify him of imminent hazards that the employer declines to correct. Compare *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). In these and other situations, Section 11(c)(1) prohibits an employer from retaliating against his employees for furnishing information or otherwise cooperating with the Secretary, in order "to prevent the [Secretary's]

channels of information from being dried up by employer intimidation of prospective complainants and witnesses." *NLRB* v. *Scrivener*, 405 U.S. 117, 122 (1972), quoting *John Hancock Mut. Life Ins. Co.* v. *NLRB*, 191 F.2d 483, 485 (D.C. Cir. 1951). As with other remedial provisions, the Court has held that such antidiscrimination provisions must be liberally construed to effectuate fully their intended purpose. *NLRB* v. *Scrivener*, *supra*, 405 U.S. at 124; *Mitchell* v. *Robert DeMario Jewelry, Inc.*, *supra*, 361 U.S. at 292-293.

A refusal to work in the face of imminent danger will generally be intimately bound up with the process of contacting an OSHA representative to request an investigation and injunctive relief. Even the Fifth Circuit in *Marshall* v. *Daniel Construction Co.*, *supra*, conceded that an employee would be protected by Section 11(c)(1) from employer retaliation for absenting himself from duty for the limited time necessary to notify the authorities about an imminently dangerous condition. 563 F.2d at 716. Once existence of this right is conceded, as it must be, it would be anomalous to conclude that the employee may not, as an incident to invoking the statutory procedure, continue to absent himself from the hazardous condition until the inspector arrives and until the inspector informs him either that he will recommend that the Secretary seek injunctive relief or that he believes no imminent danger is present (see Pet. App. A13).[15] Surely an employer would be

[15] The subsequent failure by the Secretary to seek or obtain injunctive relief would not, of course, be determinative of the

barred by Section 11(c)(1) (and perhaps be liable for contempt of court if he did so) from disciplining an employee who refuses to work *after* a court has issued an order restraining the dangerous condition. As the Court pointed out in a related context:

> It would make less than complete sense to protect the employee because he participates in the formal inception of the process (by filing a charge) or in the final, formal presentation, but not to protect his participation in the important developmental stages that fall between these two points in time.

NLRB v. *Scrivener*, *supra*, 405 U.S. at 124. Indeed, it is especially important to recognize an employee's right to decline to perform a hazardous task while awaiting arrival of an OSHA investigator because of the significant potential during this period for the employer to insist that the employee work in retaliation for his having contacted the authorities. The Secretary's regulation does not afford the employee protection unless he first seeks to correct the dangerous condition by calling it to the employer's attention. The employer's refusal to correct the condition, despite the employee's complaint, would suggest a situation of strained relations in which protection of the employee would appear to be particularly essential.

Similarly, recognizing a right to refuse to work when the OSHA inspector is not available is also

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question whether the employee reasonably believed at the time he refused to work that he was confronted with an imminent peril.

necessary to ensure that the employer does not insist that the employee perform a dangerous task out of anger for the employee's having complained about the allegedly unsafe condition and perhaps having stated an intention to contact the authorities when the opportunity arose. The Secretary's regulations provide in this regard that an employee's complaining to his employer about unsafe conditions is protected by Section 11(c)(1), even though this right is not expressly mentioned in that section or elsewhere in the Act. 29 C.F.R. 1977.9(c). See *Marshall* v. *P & Z Co.*, 1978 OSHD (CCH) ¶ 22,579 (D.D.C. 1978), aff'd mem., 600 F.2d 280 (D.C. Cir. 1979); *Marshall* v. *Springville Poultry Farm, Inc.*, 445 F. Supp. 2 (M.D. Pa. 1977); cf. *Baker* v. *Dept. of Interior Board of Mine Operations Appeals*, 595 F.2d 746 (D.C. Cir. 1978); *Phillips* v. *Dept. of Interior Board of Mine Operations Appeals*, 500 F.2d 772 (D.C. Cir. 1974).

These considerations are quite relevant to the present case. Deemer, one of the complainants, had contacted an OSHA representative about the unsafe screens on the day before he refused to walk on them. Moreover, he had been furnished with the name and address of the OSHA representative only after receiving "veiled threats" by the plant safety director —threats that Deemer interpreted as an effort to discourage him from pursuing his statutory rights. See page 8, *supra*; Pet. App. A6. When, at 11 o'clock in the evening, Deemer and Cornwell were confronted with the foreman's order that they go on the screens, they could reasonably have concluded that an OSHA inspector would not be available to intercede and as-

sess the situation—a fact that the foreman and other of petitioner's management officials might reasonably have assumed as well. Recognition of a limited right to refuse hazardous work until the OSHA inspector is contacted and carries out his duties therefore ensures that the employer will not retaliate against the employee during a period when the employee's position is the most vulnerable and during which it may often be difficult to distinguish successfully between an employer's firing of an employee for refusing to work on the one hand and, on the other, for invoking his protections under the Act at a time when those protections are most urgently needed.[16]

Finally, recognizing a right to refuse hazardous work under the circumstances described in the regulation ensures preservation of the status quo in the manner most likely *not* to result in a serious accident, until such time as the Secretary has a reasonable opportunity to investigate and act. In this sense, 29 C.F.R. 1977.12(b)(2) is in aid of the Secretary's investigative and enforcement jurisdiction and is therefore justified as a regulation "necessary to carry out [his] responsibilities under the Act." 29 U.S.C. 657(g)(2). Under this view, the regulation is valid

[16] Moreover, if an employee who refuses to perform imminently hazardous work may be subject to discipline that would almost surely be viewed by his fellow workers as unreasonable under the circumstances, the fellow employees could be chilled in the exercise of their recognized right to file complaints with their employer or with OSHA about safety matters because of a fear that they would meet a similar fate. Cf. *American Broadcasting Cos.* v. *Writers Guild*, 437 U.S. 411, 433-436 (1978).

even if, contrary to our primary submission, an employee has no personal right under the Act to absent himself from conditions that he reasonably believes likely to cause death or serious bodily harm.

C. The Regulation's Recognition of a Limited Right to Refuse to Perform Hazardous Work is Consistent With the Policies of Federal Labor Legislation

Contrary to petitioner's suggestion (Pet. Br. 20), the regulation at issue in this case does not conflict with the policies reflected in other federal labor legislation. Under Section 7 of the National Labor Relations Act, 29 U.S.C. 157, employees have a protected right to strike over safety issues. See *NLRB* v. *Washington Aluminum Co.*, 370 U.S. 9 (1962). Of course, the right recognized in the present regulation is far more limited. Individual employee self-help is protected only in the face of danger of death or serious bodily harm; concerted activity is protected under Section 7 of the NLRA without regard to an objective assessment of the seriousness of the health or safety issues. *NLRB* v. *Washington Aluminum Co.*, *supra*.[17]

[17] As the court of appeals pointed out (Pet. App. A19-A20 n.23), however, 29 C.F.R. 1977.12(b)(2) is not rendered unnecessary because of the protection afforded by Section 7 of the NLRA. The latter statute does not protect agricultural workers, supervisors, or several other types of employees covered by OSHA. 29 U.S.C. 152(3). In addition, the National Labor Relations Board declines to exercise jurisdiction over employers having a relatively minor impact on interstate commerce. There is, moreover, some question about the degree to which individual as opposed to group action is protected by Section 7, which addresses itself to concerted employee activity. Finally, individual or group action on safety issues may

In addition, Section 502 of the Labor Management Relations Act, 29 U.S.C. 143, provides protection in the specific context of hazardous working conditions. That section provides that "the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees [shall not] be deemed a strike." The section creates an exception to an express or implied no-strike obligation in a collective bargaining agreement. *Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368, 385 (1974). Thus, in legislation governing labor-management relations generally, Congress has taken cognizance of the unique circumstances presented when employees are faced with serious safety hazards at the jobsite and has provided that such circumstances warrant the type of exceptional attention given them under 29 C.F.R. 1977.12(b)(2). It would be ironic, to say the least, if a statute passed for the specific purpose of protecting employee health and safety were construed to exclude such a right.[18]

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not be protected under Section 7 where the employees are represented by a union and the union does not support the activity. *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50 (1975). See generally Ashford & Katz, *Unsafe Working Conditions: Employee Rights Under The Labor Management Relations Act and the Occupational Safety & Health Act*, 52 Notre Dame Law. 802, 803-805 (1977). Atleson, *Threats to Health and Safety: Employee Self-Help Under the NLRA*, 59 Minn. L. Rev. 647 (1975).

[18] Amicus Chamber of Commerce contends (Amicus Br. 29, 34, 35) that the right afforded by 29 C.F.R. 1977.12(b)(2) differs from that afforded by Section 502 of the Labor Management Relations Act, 29 U.S.C. 143, because it immunizes the employee from employer sanctions on the basis of the employee's subjective belief that conditions are hazardous, whereas, under Section 502, a union must present "ascertainable, objective evidence suporting its conclusion that an abnormally dangerous condition for work exists." *Gateway Coal Co.* v. *United Mine Workers, supra*, 414 U.S. at 387. But, as noted above (see page 39, note 14, *supra*), the regulation by its terms states an objective test: it requires that the circumstances be such that a "reasonable person" would conclude that there is a real danger of death or serious injury.

Petitioner suggests, however, that 29 C.F.R. 1977.12(b)(2) departs from the pattern of existing labor legislation because it, unlike 29 U.S.C. 143 and 157, requires that an employer continue to pay an employee who refuses to work under hazardous conditions. This is simply untrue. Nothing in the regulation so provides, the Secretary has not so construed it, and no court (including the court below) has ever given the regulation that interpretation. There is likewise no reason for this Court to strain to give the regulation this broader reading, which would be in conflict with other labor legislation and the legislative history of OSHA (see pages 52-62, *infra*).[19]

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[19] Amicus Chamber of Commerce (Amicus Br. 23) bases its argument that 29 C.F.R. 1977.12(b)(2) confers a right to pay on the fact that the Secretary amended the regulations implementing Section 11(c)(1) of the Act in 1977 to require that an employee representative be paid when he accompanies an inspector on an inspection tour. 29 C.F.R. 1977.21. See 42 Fed. Reg. 47344-47345 (1977). This regulation has been upheld by the United States District Court for the District of Columbia. See *Chamber of Commerce* v. *OSHA*, 465 F. Supp. 10 (D.D.C. 1978), appeal pending, No. 78-2221 (D.C. Cir.); compare *Leone* v. *Mobil Oil Corp.*, 523 F.2d 1153 (D.C. Cir. 1975). However, as explained in the regulation itself, the

Finally, as the court of appeals recognized (Pet. App. A36-A39), the administrative interpretation of Section 11(c)(1) set forth in 29 C.F.R. 1977.12(b)(2) is consistent with the interpretation given the parallel antidiscrimination provision in the Federal Coal Mine Health and Safety Act, 30 U.S.C. 801 *et seq.* In adopting amendments to that statute in 1977, Congress recast the antidiscrimination provision, 30 U.S.C. (Supp. I) 815(c)(1), in terms that are, for present purposes, quite similar to those of Section 11(c)(1). The Mine Safety provision confers on miners no express right to refuse to work under hazardous conditions. Nevertheless, the legislative history of the 1977 amendments unequivocally establishes that Congress intended the provision to protect "the refusal to work in conditions which are believed to be unsafe or unhealthful." S. Rep. No. 95-181, 95th Cong., 1st Sess. 35 (1977); see also *id.* at 36; 123 Cong. Rec. S10287-S10288 (daily ed. June

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Secretary determined, after six years of administering the Act, that the right to receive pay under such circumstances is essential to guarantee a full flow of information and to ensure unfettered exercise of the walk-around right. Cf. S. Rep. No. 95-181, 95th Cong., 1st Sess. 28-29 (1977) (expressing congressional intent that antidiscrimination provision of the Federal Coal Mine Health and Safety Act be construed in the same manner). Thus, although an employee representative might be reluctant to exercise this important walk-around right, intended to benefit all workers at the jobsite, if he had to sacrifice pay when he did so, no additional incentive is needed for an employee to absent himself from conditions threatening to life or limb. Moreover, the legislative history of OSHA would weigh against finding a right to pay when an employee refuses to perform work. See pages 52-62, *infra*.

21, 1977); 123 Cong. Rec. H11663 (daily ed. Oct. 27, 1977). These expressions of congressional intent were no doubt based in large part on cases arising under the prior antidiscrimination provision in the Federal Coal Mine Health and Safety Act, 30 U.S.C. 820(b)(1), indicating that a miner had a "right to refuse to work under conditions believed in good faith to be dangerous." *Munsey* v. *Morton*, 507 F.2d 1202, 1209 n.58 (D.C. Cir. 1974); *Phillips* v. *Dept. of Interior Board of Mine Operations Appeals*, *supra*, 500 F.2d at 778-780;[20] cf. *Munsey* v. *Federal Mine Safety & Health Review Comm'n*, 595 F.2d 735, 743 (D.C. Cir. 1978).

Thus, the regulation involved in this case is consistent with the general pattern of labor legislation in the area of occupational safety and health.[21] This reinforces the court of appeals' conclusion that the right to refuse work under hazardous conditions when the statutory enforcement procedures cannot be successfully invoked may reasonably be implied in OSHA

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[20] The Senate Report cites both *Phillips* and the first *Munsey* decision with approval. S. Rep. No. 95-181, *supra*, at 36.

[21] Amicus Chamber of Commerce contends (Amicus Br. 30-36) that the Secretary's regulation will interfere with other established procedures designed to resolve safety disputes and with the collective bargaining process. However, the Department of Labor and the National Labor Relations Board have entered into a memorandum of understanding under which the two agencies coordinate their enforcement efforts under their respective statutes in order to avoid duplicative proceedings. 40 Fed. Reg. 26083 (1975). Moreover, Department of Labor regulations contemplate that deferral to contractual arbitration for resolution of safety-related complaints may be in order in appropriate cases. 29 C.F.R. 1977.18.

and constitutes an appropriate measure for the implementation of the Secretary's responsibilities under the Act. The regulation is therefore fully consistent with the legislative purpose of the Act "to balance the need of workers to have a safe and healthy work environment against the requirement of industry to function without undue interference." 116 Cong. Rec. 37342 (1970) (Leg. Hist. 435) (remarks of Sen. Williams).

II

NOTHING IN THE LEGISLATIVE HISTORY OF THE ACT SUGGESTS THAT CONGRESS INTENDED TO DENY EMPLOYEES THE PROTECTION AFFORDED BY THE REGULATION

Petitioner does not argue that 29 C.F.R. 1977.12 (b)(2) is inconsistent with the overriding purposes of the Act to prevent occupational injuries. Instead, petitioner relies almost exclusively—as did the Fifth Circuit in *Marshall* v. *Daniel Construction Co.*, *supra*, 563 F.2d at 712-715 on several portions of the legislative history of the Act that it contends reflect a congressional intent to deny the type of protection afforded by the regulation.

In light of the statutory foundation for the regulation, as discussed in Part I of this brief, only the clearest expression of congressional intent could overcome the underlying, inescapable conclusion that Congress, in enacting OSHA, could not have desired to put employees to the choice of either working under life-threatening conditions or being subject to retaliation by their employers, including possible loss of their jobs. Far from manifesting this clear congressional intent, however, the incidents relied upon by

petitioner do not even concern the question whether an employee must work under life-threatening conditions on pain of employer sanctions.

Three bills figure significantly in the legislative history. The Senate Committee on Labor and Public Welfare reported S. 2193, 91st Cong., 2d Sess. (1969) (Leg. Hist. 204-295) (the "Williams bill") to the full Senate. S. Rep. No. 91-1282, 91st Cong., 2d Sess. (1970) (Leg. Hist. 141). That bill passed the Senate with only a few changes (Leg. Hist. 528), and it became the basis in most respects for OSHA as finally enacted. The House Committee on Education and Labor reported H.R. 16785, 91st Cong., 2d Sess. (1970) (Leg. Hist. 893-976) (the "Daniels bill") to the full House. H.R. Rep. No. 91-1291, 91st Cong., 2d Sess. (1970) (Leg. Hist. 831). This bill attracted greater opposition. Although Rep. Daniels offered on the House floor to amend his bill in several instances to make it more acceptable, the House instead passed a substitute bill, first introduced as H.R. 19200, 91st Cong., 2d Sess. (1970) (Leg. Hist. 763-830, 1092-1118) (the "Steiger bill"). See 116 Cong. Rec. 38723-38724 (1970) (Leg. Hist. 1112-1114). The Conference Committee adopted most of the provisions of the Williams bill. H.R. Cong. Rep. No. 91-1765, 91st Cong., 2d Sess. (1970) (Leg. Hist. 1194-1228).

Petitioner argues that the House's rejection of the Daniels bill in favor of the Steiger bill demonstrates a congressional intent to withhold protection from all refusals by employees to work. This is because the Daniels bill, unlike the Steiger bill, contained a provision permitting employees to decline to perform

work, but to continue to be paid, if they would be exposed to toxic substances at levels in excess of those established by the government as safe. Second, petitioner contends that the elimination of provisions in the Williams and Daniels bills that would have given an inspector employed by the Department of Labor the power to shut down a plant, without invocation of the judicial process, necessarily implies that Congress could not have intended to allow employees to absent themselves from dangerous working conditions on their own initiative without fear of reprisal.

Petitioner's claims are belied by the record. The two provisions were rejected in large measure because of a belief that they would constitute a major departure from the status quo in the area of labor management relations—in the first case, by requiring employers to pay workers who were withholding their services, and in the second, by creating the potential for thrusting a Labor Department inspector, acting unilaterally, into the middle of a dispute between management and labor. As discussed above, 29 C.F.R. 1977.12(b)(2) is not a departure from existing labor legislation. Moreover, the rejected provisions had other features that readily distinguish them from the regulation at issue here.

A. The "Strike with Pay" Provision

The Daniels bill, as reported by the House Committee, contained a section that was quickly termed a right to "strike with pay"—a label, in the Fifth Circuit's words, that "proved to be its epitaph."

Marshall v. *Daniel Construction Co.*, *supra*, 563 F.2d at 712.[22] This provision directed the Secretary of Health, Education, and Welfare to publish annually a list of all known or potentially toxic substances and the concentrations at which such toxicity is known to occur. The Secretary would also have been required

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[22] Section 19(a)(5) of H.R. 16785, *supra*, as reported to the House floor, provided:

> The Secretary of Health, Education, and Welfare shall publish within six months of enactment of this Act and thereafter as needed but at least annually a list of all known or potentially toxic substances and the concentrations at which such toxicity is known to occur; and shall determine following a request by any employer or authorized representative of any group of employees whether any substance normally found in the working place has potentially toxic or harmful effects in such concentration as used or found; and shall submit such determination both to employers and affected employees as soon as possible. Within sixty days of such determination by the Secretary of Health, Education, and Welfare of potential toxicity of any substance, an employer shall not require any employee to be exposed to such substance designated above in toxic or greater concentrations unless it is accompanied by information, made available to employees, by label or other appropriate means, of the known hazards or toxic or long-term ill effects, the nature of the substance, and the signs, symptoms, emergency treatment and proper conditions and precautions of safe use, and personal protective equipment is supplied which allows established work procedures to be performed with such equipment, *or unless such exposed employee may absent himself from such risk of harm for the period necessary to avoid such danger without loss of regular compensation for such period.*

See H.R. Rep. No. 91-1291, *supra*, at 12 (Leg. Hist. 842) (emphasis added).

to determine, at the request of an employer or authorized employee representative, whether any substance normally used in the workplace has potentially toxic or harmful effects in the concentrations used. Within 60 days of a determination by the Secretary that a substance was potentially toxic, an employer could not have required any employee to be exposed to the substance in toxic or greater concentrations unless he furnished the employee with information about its toxicity and with protective equipment "or unless such exposed employee may absent himself from such risk of harm for the period necessary to avoid such danger without loss of regular compensation for such period." H.R. Rep. No. 91-1291, *supra*, at 12 (Leg. Hist. 842). The Committee Report explained the provision as follows:

> There is still a real danger that an employee may be economically coerced into self exposure in order to earn his livelihood, so the bill allows an employee to absent himself from that specific danger for the period of its duration without loss of pay.

H.R. Rep. No. 91-1291, *supra*, at 30 (Leg. Hist. 860).

The bill ultimately passed by the House did not contain a similar provision, nor did the Williams bill reported by the Senate Committee and passed by the full Senate. As a result, no such provision was included in OSHA as finally enacted. But Congress' failure to include the provision hardly supports petitioner here.

First, Section 19(a)(5) of the Daniels bill, unlike the regulation at issue in the present case, did not

address situations in which the employee reasonably believed that there was a real and imminent danger of death or serious injury. To the contrary, under the Daniels bill employees could have exercised the right to refuse to work and to be paid when they did so only after the employer had been given a period of *60 days* within which to develop appropriate warnings and protective measures to ensure that employees were not exposed to substances above toxic levels. If exposure to the substances identified by the Secretary of HEW as toxic presented an imminent threat of death or serious bodily injury, the Secretary of Labor would presumably have resorted to his emergency powers under Section 12 of the Daniels bill (Leg. Hist. 742) to counteract the dangers by issuing an administrative order or by seeking a temporary restraining order long before expiration of the 60-day period. Thus, Section 19(a)(5) of the Daniels bill necessarily dealt with situations that did *not* present an imminent and grave threat to health and safety. Congress' failure to enact Section 19(a)(5) therefore sheds little or no light on the measures to which Congress would have intended employees to resort, without fear of retaliation, if they *were* confronted with an imminent danger to life or limb.

Beyond this, it is clear that Congress' decision not to include a provision similar to Section 19(a)(5) of the Daniels bill was based on the fact that employees would have been entitled to draw their regular salary when they refused work after expiration of the 60-day period—or, as opponents of the Daniels

bill put it, to "strike with pay" (see Pet. App. A27-A28 & n.35).

To meet objections to the House Committee bill, Rep. Daniels proposed a number of amendments in the hope that the bill would prevail over the substitute bill Rep. Steiger intended to offer on the House floor. In place of the "strike with pay" provision, Rep. Daniels proposed the addition of a subsection that was eventually adopted as Section 8(f)(1) of the Act, 29 U.S.C. 657(f)(1) permitting an employee or employee representative who believes a violation of a health or safety standard exists that threatens physical harm or imminent danger to notify the Secretary and to request an immediate inspection. The Secretary must then inspect the workplace as soon as practicable if he concludes that there is reasonable cause to believe that a violation or danger exists. 116 Cong. Rec. 38377 (1970) (Leg. Hist. 1008-1009).[23] This suggested amendment to the House

[23] Section 8(f)(1), as enacted, 29 U.S.C. 657(f)(1), provides:

> Any employees or representative of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employees or representative of employees, and a copy shall be provided the employer or his agent no later than at the time of inspection, except that, upon the request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear in such copy or on any record published, released, or made available pursuant to subsection (g) of this section. If upon receipt of such notification the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable, to determine if such violation or danger exists. If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists he shall notify the employees or representative of the employees in writing of such determination.

Committee bill was apparently drawn from Section 8(f)(1) of S. 2193, *supra*, which had passed the Senate the previous week (see Leg. Hist. 550). Rep. Daniels inserted a statement in the record explaining the amendment:

> The provision on employees not losing pay was so generally misunderstood that we have decided to drop it. We have no provision for payment of employees who want to absent themselves from risk of harm; instead, we have this amendment which enables employees subject to a risk of harm to get the Secretary into the situation quickly. Instead of making provisions for employees when their employer is not providing a safe workplace, we have strengthened the enforcement by this amendment provision to try and minimize the amount that employess will be subject to the risk of harm.

116 Cong. Rec. 38377-38378 (1970) (Leg. Hist. 1009).

Petitioner characterizes (Pet. Br. 29) Rep. Daniels' explanation of his proposed amendment as an assurance that, if it were adopted, the committee bill would "no longer contain[] a right to refuse work provision." But the explanation just quoted is quite

clearly limited to an assurance that the proposed amendment would delete any requirement that employees who absent themselves from risk of harm be *paid* by their employers when doing so.

The Steiger bill, which contained no "strike with pay" provision, was adopted as a substitute by the House before Rep. Daniels' suggested amendments to the committee bill were voted upon.[24] The Conference Committee approved the substance of the Senate language, which Rep. Daniels had previously proposed and which was eventually enacted as Section 8(f)(1), 29 U.S.C. 657(f)(1), providing for prompt inspection by the Secretary when physical harm or imminent danger to an employee is threatened. Thus, when it approved the Conference Committee report, the House effectively adopted the substance of the amendment Rep. Daniels had offered to the House Committee bill to ensure that employees would not be permitted to absent themselves from work *with pay*. There is no reason to assume that, in doing so, the House intended to go substantially beyond what Rep. Daniels had suggested and to permit employer retaliation against employees who refused to work in highly dangerous situations *without pay*.

What is more, as the court of appeals noted (Pet. App. A27-A28 & n.35), it is significant that *every time* the issue of an employee's right to absent himself from hazardous work was discussed in the legis-

[24] As the court of appeals pointed out (Pet. App. A22-A23 n. 26), the Daniels bill was opposed on a number of grounds, not merely because of the "strike with pay" provision.

lative debates, it was in the context of the receipt of compensation while doing so.[25] In the Senate, for example, Senator Williams stressed that his bill did

[25] Petitioner erroneously asserts that isolated remarks by Rep. Cohelan and Rep. Steiger belie this statement by the court of appeals and demonstrate that Congress rejected the "philosophy which now is embodied in the Secretary's regulation" (Pet. Br. 27 & n.20). Rep. Cohelan stated that the Daniels bill authorized "the worker to leave his post whenever and wherever conditions exist that endanger his health or safety." 116 Cong. Rec. 38375 (1970) (Leg. Hist. 1001). But read in context, it is clear that Rep. Cohelan's statement was referring to the strike *with pay* provision, and there is no reason to believe he was likewise referring to a narrower right to leave hazardous conditions without pay. In any event, such a casual description by an individual member of Congress who was neither a sponsor of the Daniels bill nor a member of the committee that considered it is entitled to little weight. *Cf. National Woodwork Mfgrs. Ass'n* v. *NLRB*, 386 U.S. 612, 640 (1967); *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394-395 (1951). See generally 2A Sutherland, *Statutory Construction* § 48.13 (C. Sands 4th ed. 1973).

Petitioner also refers (Pet. Br. 26) to the statement of a speaker, listed in the Congressional Record as Rep. Steiger, that his bill does not authorize "strikes without pay." 116 Cong. Rec. 38708 (1970) (Leg. Hist. 1075). This remark is either a misprint or a misstatement, because the context again shows that the speaker was referring to the "strike with pay" provision of the Daniels bill. In either case, no relevant inference can be drawn. At least one misprint does occur in this passage: the speaker is unmistakably Rep. Perkins, Chairman of the House committee that reported the Daniels bill, not Rep. Steiger, whose substitute bill the speaker is vigorously attacking. In context, it is apparent that Rep. Perkins is merely restating the position, frequently voiced by the Daniels bill's supporters, that the "strike with pay" provision had been misunderstood, but that the committee bill would nevertheless be amended to delete it.

not contain a provision similar to Section 19(a)(5) of the Daniels bill:

> I should also add, despite some widespread contentions to the contrary, that the committee bill does not contain a so-called strike-pay[26] provision. Rather than raising a possibility for endless disputes over whether employees were entitled to walk off the job with full pay, it was decided in committee to enhance the prospects of compliance by the employer through such means as giving the employees the right to request a special Labor Department investigation or inspection.

116 Cong. Rec. 37326 (1970) (Leg. Hist. 416).

As the court of appeals observed (Pet. App. A28), it is understandable that Congress would have been concerned about "the monetary incentive that workers would have by claiming that they believed a situation was hazardous and then sitting back and collecting their paychecks for doing nothing." Not only would this have created the potential for a distracting dispute over pay when the true focus should be on the dangerous working conditions; it would also have altered the balance in labor-management relations by introducing a powerful economic weapon for use, and perhaps misuse, against the employer. These concerns do not apply with respect to the regulation involved in this case: 29 C.F.R. 1977.12(b) does not provide for the payment of employees who refuse to perform hazardous work, and it does not present the potential for distracting disputes over an

[26] The passage in the Congressional Record reads "strike-pay provision;" the passage in the bound legislative history reads "strike-with-pay provision."

entitlement to compensation or arm employees or unions with the economic weapon of a "strike with pay." [27]

As is evident from this brief discussion, the legislative history furnishes no basis for arguing that Congress, in declining to include a provision similar to Section 19(a)(5) of the Daniels bill, intended to do anything more than to preclude what had been termed a right to "strike with pay." Apparently recognizing this, petitioner argues (Pet. Br. 19-20, 35-36) that 29 C.F.R. 1977.12(b)(2) should be con-

[27] The House Committee report indicated that under Section 19(a)(5) of the Daniels bill, an employer could reassign other work to any employees who were entitled to pay when they refrained from being exposed to toxic substances. See H.R. Rep. No. 91-1291, *supra*, at 30 (Leg. Hist. 860). This ability to reassign employees, "except as [the employer] is obligated under other agreements" (*ibid.*), could have enabled the employer under certain circumstances to avoid paying for work not performed.

Contrary to the contention of Amicus Chamber of Commerce (Amicus Br. 23), this explanation of the possible operation of the so-called "strike with pay" provision is not the equivalent of 29 C.F.R. 1977.12(b)(2). Under Section 19(a)(5) of the Daniels bill, an employer would have been required to pay his employees *in all instances*, even if he did not or could not reassign them, and the language in the committee report, quoted above, would presumably have automatically precluded the employer from reassigning employees where a collective bargaining agreement posed an obstacle. Under 29 C.F.R. 1977.12(b)(2), on the other hand, the employer has no such underlying obligation to pay employees who refuse to perform hazardous work, and he is not required to furnish them with other work unless, as in the present case, the employer could normally have been expected to reassign the employees and his failure to do so must therefore be viewed as discrimination or retaliation for the exercise of the right to refuse to perform a particular dangerous task.

strued to confer a right to receive pay when no work is performed. But as we have pointed out above (see page 47, *supra*), nothing on the face of the regulation suggests that it confers such a right, and the Secretary and the courts have never construed it in that manner. Accordingly, there is no inconsistency between the regulation and whatever inferences may properly be drawn from Congress' refusal to include a "strike with pay" provision in the Act.

B. The Imminent Danger Provision

Petitioner also argues (Pet. Br. 25-32) that the legislative history of Section 13 of the Act, 29 U.S.C. 662, which prescribes the procedures that the Secretary must follow in counteracting conditions or practices that present an imminent danger to employee health or safety, manifests a congressional intent that is inconsistent with the regulation protecting the right of employees to absent themselves from imminent danger. A review of the legislative history of Section 13 demonstrates, however, that Congress deleted the authority for individual Labor Department inspectors to order the closing of imminently hazardous work-sites because of concern that this authority might inject the Secretary into private labor disputes and because of a belief that government-ordered work stoppages should be accompanied by substantial procedural protections.

Section 13(a) of the Act, 29 U.S.C. 662(a), provides that the United States district courts shall have jurisdiction, upon petition of the Secretary, to re-

strain any conditions or practices in any place of employment that create a danger that could reasonably be expected to cause death or serious physical harm immediately or before the imminence of the danger can be eliminated through the ordinary enforcement procedures under the Act. The court is empowered to order measures to avoid, correct, or remove the danger or to prohibit the employment of persons in the area.

The Daniels and Williams bills, as reported by the House and Senate committees, allowed the Secretary or his representative to order similar relief administratively, without invoking the judicial process. H.R. 16785, *supra*, Section 12(a) (Leg. Hist. 955-956); S. 2193, *supra*, Section 11(b) (Leg. Hist. 263-264). The administratively ordered cessation of work could have continued for up to five days under the Daniels bill and 72 hours under the Williams bill. Congress deleted these provisions from the bill eventually enacted.

Resistance to the proposals permitting the closing of workplaces by administrative order surely was not based on an affirmative desire to keep employees on the job in the face of apparent safety hazards or even, as petitioner suggests (Pet. Br. 32), to ensure that work would never cease, regardless of imminent danger, unless ordered by a court. Rather, the opposition to this provision centered exclusively on Congress' reluctance to give a Labor Department inspector or other *government official* the unilateral au-

thority, without resort to the judicial process, to order corrective measures by the employer or the removal of employees from the danger area. This power appeared to be all the more awesome because, under the Williams and Daniels bills, the inspector could effectively have closed down an entire plant or operation for a period of three or five days.[28]

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[28] The legislative history contains a number of references by opponents of the provision to the administratively-ordered closing of an entire plant or place of employment. See, *e.g.*, H.R. Rep. No. 91-1291, *supra*, at 47, 55-56 (Leg. Hist. 877, 885-886) (minority views); S. Rep. No. 91-1282, *supra*, at 60, 63 (Leg. Hist. 199, 202) (individual and minority views). See also 116 Cong. Rec. 37624-37625 (1970) (Leg. Hist. 508) (adoption of amendment to Senate bill requiring concurrence of Secretary or other presidential appointee in Labor Department before issuance of administrative order "to close a business or plant, in whole or in substantial part"). Compare 116 Cong. Rec. 37603 (1970) (Leg. Hist. 456) (remarks of Sen. Saxbe) ("No one would disagree" with inspector's closing a single machine, as distinguished from an entire plant).

Under 29 C.F.R. 1977.12(b)(2), only the particular employees who reasonably fear death or serious bodily injury are protected from employer discipline if they decline to perform their assigned tasks; the regulation affords no protection to others who leave their jobs in sympathy. In the present case, the refusal by Deemer and Cornwell to walk the screens in petitioner's plant had no effect on the operations of the plant generally and did not result in other employees' being thrown out of work. The effects of the two complainants' refusal to perform a specific hazardous task were therefore far removed from the type of plant-wide disruptions that had generated opposition in Congress. See *Usery* v. *Babcock & Wilcox Co.*, *supra*, 424 F. Supp. at 757; Note, *The Occupational Safety and Health Act of 1970: The Right to Refuse to Work Under Hazardous Conditions*, 1979 Wash. U. L. Q. 571, 587-588.

Thus, five members of the House Committee on Education and Labor filed minority views objecting to the administrative shut-down authority, among other provisions of the Daniels bill reported by the Committee, because it gave "extreme power to one person" (H.R. Rep. No. 91-1291, *supra*, at 55 (Leg. Hist. 885). They predicted that the "all powerful inspector would become a pawn in labor disputes":

> The great potential for misuse that would be created if this power were put into the hands of an inspector in the field was amply demonstrated during the public hearings. The testimony reflected fears that pressure would be brought to bear upon federal inspectors to shut down plants in cases other than *bona fide* imminent danger situations. Thus, this unrestricted power in one person would realistically find itself in the middle of labor-management disputes. It would be far simpler for a disgruntled employee to pass by established labor-management grievance procedures and complain to a federal safety inspector that unsafe conditions existed when the real basis of a dispute was properly a labor-management problem, to be settled by established collective bargaining methods.

H.R. Rep. No. 91-1291, *supra*, at 56 (Leg. Hist. 886).[29] These minority members also asserted that

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[29] The minority members referred to testimony submitted at the hearings on the Daniels bill describing a situation in which employees at a refinery went on strike, after which the company attempted to keep the plant open through use of management personnel. The union then filed a complaint with the Secretary requesting an investigation of the safety of the plant when it was operated with less than a full crew,

the administrative shut down power amounted to "summary punishment which is contrary to our established standards of law" (*ibid.*).[30]

Similar arguments were presented against the provision on the Senate side. Senator Tower argued that "[t]he enormous amount of power given to the Secretary of Labor could easily be abused, culminating in a breakdown of existing Government neutrality in labor-management relations." 116 Cong. Rec. 37346 (1970) (Leg. Hist. 448). Senator Schweiker urged that due process, through resort to the judicial

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thereby raising the potential of the loss of government contracts under the Walsh-Healey Act, 41 U.S.C. 35(e). See *Occupational Safety and Health Act of 1969: Hearings on* H.R. 843, H.R. 3809, H.R. 4294, H.R. 13373 *Before the Select Subcomm. on Labor of the House Comm. on Education and Labor,* 91st Cong., 1st Sess. (Part II). 1021, 1025-1026 (1969).

[30] See also 116 Cong. Rec. 38372 (1970) (Leg. Hist. 992) (remarks of Rep. Steiger) (substitute bill not containing administrative shut-down provision ensures "due process"); 116 Cong. Rec. 38393 (1970) (Leg. Hist. 1050) (remarks of Rep. Mitchell) (Daniels bill "disregards constitutional due process; puts unreasonable power and authority in the hands of inspectors, many of whom might be incompetent or easily influenced"); 116 Cong. Rec. 38394 (1970) (Leg. Hist. 1052) (remarks of Rep. Broomfield) ("The Daniels bill gives this power to a Labor Department inspector who unfortunately may choose to shut down a plant arbitrarily and may be influenced by business or union pressure"); 116 Cong. Rec. 38704 (1970) (Leg. Hist. 1062) (remarks of Rep. Sikes) ("Secretary of Labor could arbitrarily take action to shut down a plant"); 116 Cong. Rec. 42203 (1970) (Leg. Hist. 1210) (remarks of Rep. Daniels) (House conferees insisted on deletion of administrative shut-down authority "cognizant of the concern of * * * Members over arbitrary action by inspectors").

process, should be followed before closing down a plant. 116 Cong. Rec. 37602 (1970) (Leg. Hist. 453-454). And Senator Saxbe offered an amendment to delete the administrative shut-down provision, arguing that a single inspector should not be empowered to close a business and temporarily put perhaps hundreds of employees out of work and that only a third party with a disinterested and objective viewpoint—a court—should make such an important decision. 116 Cong. Rec. 37602 (1970) (Leg. Hist. 452-453).[31]

The House of Representatives voted to substitute the Steiger bill, which did not contain an administrative shut-down provision, for the Daniels bill, which did.[32] On the Senate floor, Senator Williams, in an

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[31] See also 116 Cong. Rec. 37388 (1970) (Leg. Hist. 425) (remarks of Sen. Dominick) ("an order, without any court findings, without any adjudication, without any due process"); 116 Cong. Rec. 37625 (1970) (Leg. Hist. 508) (remarks of Sen. Javits) (expressing a need "further to protect against arbitrary closedowns"); 116 Cong. Rec. 41763 (1970) (Leg. Hist. 1149 (remarks of Sen. Prouty) (conference report eliminates Secretary's power to "arbitrarily shut down the operations of an employer").

[32] In order to make the House Committee bill more acceptable to supporters of the Steiger substitute, Rep. Daniels offered to propose an amendment to the committee bill deleting the authority for administrative closing orders. 116 Cong. Rec. 38707 (1970) (Leg. Hist. 1071). This and his other suggested amendments were never considered by the House because the Steiger bill was substituted for the Daniels bill on the floor. 116 Cong. Rec. 38715-38724 (1970) (Leg. Hist. 1092-1114).

effort to allay the concerns of those who feared placing substantial power to order drastic action in low-level administrative personnel, agreed to an amendment providing that approval by a Labor Department official appointed by the President would be required before a plant could be closed in whole or substantial part. 116 Cong. Rec. 37624-37625 (1970) (Leg. Hist. 508-509).[33] This amendment was included in the Senate bill. 116 Cong. Rec. 37636 (1970) (Leg. Hist. 563). However, the House conferees, "cognizant of the concern of [House] Members over arbitrary action by inspectors," 116 Cong. Rec. 42203 (1970) (Leg. Hist. 1210) (remarks of Rep. Daniels), insisted on deletion of even this more limited provision in the Senate bill. The Senate conferees receded on the point, H.R. Conf. Rep. No. 91-1765, 91st Cong., 2d Sess. 40 (1970) (Leg. Hist. 1193), and the Act as passed contained no such provision.

The regulation at issue in this case raises none of the concerns that led Congress to reject the provision for administratively-ordered shut-downs. The regulation does not create the potential for substantial financial injury to employers and lost work days to employees resulting from arbitrary and unilateral action by a single government inspector, who might

[33] The Williams bill reported by the Senate Committee already contained a provision designed to meet some of the criticism of vesting too much power in individual inspectors. Section 11(b) of S. 2193, *supra*, as reported, required approval of the Regional Director of the Labor Department before issuance of an administrative closing order. See Leg. Hist. 264; S. Rep. No. 91-1282, *supra*, at 13 (Leg. Hist. 153).

be inexperienced or subject to pressure. The regulation does not enable the government to compel the closing of a plant or the cessation or disruption of any operations without obtaining a court order.

Nor does the regulation raise the spectre of involving the Secretary of Labor or safety inspectors as "pawns" in labor disputes through the issuance of administrative orders. To the contrary, the decision by one or more employees to refuse to work in the face of hazardous working conditions is a personal one and constitutes the exercise of employee rights that have long been protected under federal labor law. *Gateway Coal Co.* v. *United Mine Workers*, *supra*, 414 U.S. at 385; *NLRB* v. *Washington Aluminum Co.*, *supra*. See also Pet. App. A3; *Marshall* v. *Daniel Construction Co.*, *supra*, 563 F.2d at 721-722 (Wisdom, J., dissenting).

Moreover, the employee who absents himself from a dangerous condition must do so at his own risk, because he cannot know in advance whether his actions will subsequently be viewed by the Secretary or the courts as having been reasonable and in good faith under the regulation. See Pet. App. A36. This factor inevitably introduces an element of caution into employee self-help measures under the regulation that would have been wholly lacking under the rejected provisions for administratively-ordered closings. Under the provisions rejected by Congress, an employee or union could have pressured an inspector to issue an unreasonable administrative order shutting down the plant and then, presumably, would

have been wholly insulated from any liabiilty when the inspector's order proved to be in error.[34]

Finally, the regulation raises none of the due process concerns voiced by opponents of the administrative closing provision. Although those concerns may arise in connection with a government-ordered shut down, "[p]rivate employees may refuse to work without violating due process." *Marshall* v. *Daniel Construction Co., supra,* 563 F.2d at 721 (Wisdom, J., dissenting). And, unlike the inspector in the committee bills, an employee who walks off the job cannot order the employer to make corrections on the spot. *Id.* at 720; Pet. App. A35. The mechanism for enforcement of the regulation fully comports with due process. An employer who does not believe that the task or conditions that induced the employee to refuse to work were truly dangerous is free to test his belief by discharging or otherwise disciplining the employee (subject to whatever restraints are imposed by the collective bargaining agreement). Under the regulation and the Act, the employer will suffer no sanction for doing so unless and until the government proves its case in court (Pet. App. A35).

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[34] The Daniels bill, as reported by the House Committee, contained a provision that would have allowed an employer or employee injured by the Secretary's arbitrary or capricious issuance of or failure to issue an order to cease operations to sue in the Court of Claims to recover damages for the injuries sustained. H.R. 16785, *supra,* Section 12(c) (Leg. Hist. 743). But this provision would have created no disincentive for individual employees or a union to urge the Secretary to issue an administrative closing order for insufficient or improper reasons.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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